Mathavan a/l Shunmugam v Woo Bee Leng

HIGH COURT (TAIPING) — CIVIL APPEAL NO 12-31 OF 1993(T)
ABDUL MALIK ISHAK J
28 DECEMBER 1994

Civil Procedure *— Appeal — Findings of fact — Judge without jury — Governing principles — When appellate court may interfere with lower court's conclusion*

Civil Procedure *— Pleadings — Necessity for express pleadings — Contributory negligence pleaded but not particularized — Whether fatal*

In a motor accident, a motor cycle ridden by the appellant collided into the right rear portion of a motor car driven by the respondent. The appellant sued the respondent and in his statement of claim included an allegation of contributory negligence on the part of the respondent but did not specify the particulars of the contributory negligence. Two conflicting versions as to how the accident happened were given by the parties. The trial judge accepted the version of the respondent as being more probable, and found the appellant wholly liable. The appellant appealed, contending that the trial judge had failed to consider the question of contributory negligence in coming to his decision.

Held, dismissing the appeal:

(1) There is a heavy onus on a party who seeks to displace the conclusion formed by the trial judge on questions of fact. An appellate court should be slow in coming to a different conclusion in the absence of misdirection by the judge as the trial judge had the advantage of having seen and heard the witnesses.

(2) From the printed evidence, the trial court had considered all the relevant and pertinent points before coming to the decision. Also, there was no misdirection by the trial court on the available evidence and the court was not disposed to come to a different conclusion as it did not have the advantage of the trial court of having seen and heard the witnesses. The court was satisfied that the trial court's conclusions were justified.

(3) The fact that the trial court made specific findings of fact in this case was another stronger ground to affirm the decision of the trial court.

(4) On the issue of contributory negligence, though the appellant had pleaded contributory negligence in his statement of claim, the failure to particularize them was fatal and was as good as not pleading it at all.

(5) In the present appeal, the trial court rightly considered the question of contributory negligence and came to the conclusion

that on the available evidence, there was no contributory negligence on the respondent's part. A

[Bahasa Malaysia summary

Dalam suatu kemalangan kenderaan bermotor, sebuah motosikal yang ditunggang oleh perayu telah melanggar bahagian belakang sebelah kanan sebuah motokar yang dipandu oleh responden. Perayu telah mendakwa responden dan di dalam pernyataan tuntutannya memasukkan tuduhan kecuaian sertaan terhadap pihak responden tetapi tidak menyatakan butir-butir kecuaian sertaan itu. Dua versi yang bertentangan mengenai bagaimana kemalangan itu telah berlaku diberikan oleh pihak-pihak tersebut. Hakim perbicaraan menerima versi responden sebagai lebih mungkin, dan mendapati bahawa perayu bertanggungjawab sepenuhnya. Perayu telah membuat rayuan dan menegaskan bahawa hakim perbicaraan gagal mempertimbangkan soalan kecuaian sertaan apabila membuat keputusannya. B C D

Diputuskan, menolak rayuan itu:

(1) Beban yang berat terletak pada pihak yang cuba mencabar kesimpulan yang telah dibentuk oleh hakim perbicaraan atas soalan fakta. Sesuatu mahkamah rayuan haruslah jarang membuat keputusan yang berbeza jika tidak terdapat sebarang salah arahan oleh hakim kerana hakim perbicaraan mempunyai kelebihan dalam melihat dan mendengar para saksi. E

(2) Daripada keterangan bercetak, hakim perbicaraan telah mempertimbangkan kesemua perkara yang relevan dan penting sebelum membuat keputusan itu. Lebih-lebih lagi, tidak terdapat salah arahan oleh mahkamah perbicaraan berdasarkan keterangan yang ada dan mahkamah rayuan tidak terdorong untuk membuat keputusan yang berbeza kerana ia tidak mempunyai kelebihan mahkamah perbicaraan untuk melihat dan mendengar para saksi. Mahkamah rayuan berpuas hati berdasarkan keterangan bercetak bahawa keputusan mahkamah perbicaraan adalah berjustifikasi. F G

(3) Kenyataan bahawa mahkamah perbicaraan telah membuat pendapat fakta yang tertentu di dalam kes ini merupakan satu lagi alasan yang lebih kuat untuk mengesahkan keputusan mahkamah perbicaraan tersebut.

(4) Atas isu kecuaian sertaan, sungguhpun perayu tersebut telah mengemukakan kecuaian sertaan dalam plidingnya, kegagalan untuk membutirkannya telah membawa padah dan sama seperti tidak mengemukakannya dalam pliding sama sekali. H

(5) Dalam rayuan ini, mahkamah perbicaraan telah mempertimbangkan soalan kecuaian sertaan dengan betul dan telah membuat keputusan bahawa berdasarkan keterangan yang ada, tidak terdapat kecuaian sertaan pada pihak responden.] I

A **Notes**

For cases on appeals from findings of fact, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 366–435.

For cases on the necessity for express pleadings, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2613–2629.

B **Cases referred to**

Fookes v Slaytor [1979] 1 All ER 137; [1978] 1 WLR 1293 (refd)

Tay Kheng Hong v Heap Moh Steamship Co Ltd [1964] MLJ 87 (folld)

C *Kula Segaran* (*Kula & Associates*) for the appellant.

S Athithan (*Chong & Poh*) for the respondent.

Abdul Malik Ishak J: This is an appeal from the decision of the judge of the Sessions Court, Taiping, Perak ('the trial court') in an action arising out of a collision between motor cycle, ABL 7821 and motor car, AAR D 3283. The motor cycle was ridden by the appellant/plantiff, while the motor car was driven by the respondent/defendant. The trial court gave judgment to the respondent/defendant and dismissed the appellant/plantiff's claim with costs. The trial court also proceeded to assess damages and, before me, both parties conceded that the damages assessed by the trial court were correctly quantified and this appeal merely revolves on the E issue of liability.

There were two conflicting versions. The appeallant/plaintiff alleged that he rode the motor cycle along the stretch of Jalan Elizabeth, Taiping, Perak on 11 October 1988 at about 12.25pm following closely the respondent/defendant who was driving the motor car. On approaching the F junction of Jalan Elizabeth/Jalan Sultan, the appellant/plaintiff intended to and was turning to the right to Jalan Sultan and whilst in the process of doing so, the respondent/defendant suddenly and without warning turned to the right to negotiate the turning into Jalan Sultan. This sudden turning by the respondent/defendant resulted in a collision between both vehicles. The motor cycle collided into the right rear portion of the motor car more G towards and almost a fraction from the right rear bumper (see photograph B, at p 18 of the appeal record).

The respondent/defendant's version went like this. He was driving the motor car along the main road of Jalan Elizabeth, Taiping at a speed of 60 km/hour and upon reaching the Jalan Elizabeth/Jalan Sultan junction, H he reduced his speed to 30 km/hour. As the respondent/defendant reached that junction, a motor cycle suddenly shot out from the minor road of Jalan Sultan and rammed into the extreme right rear of his motor car. The collision caused the motor cyclist and the motor cycle ridden by him to land right smack in the middle of Jalan Elizabeth (see the sketch plan at I p 16 of the appeal record). The respondent/defendant stopped his motor car, alighted from it and hailed a passing vehicle to send the motor cyclist to the hospital.

From these two conflicting versions, the trial court preferred the version of the respondent/defendant as being more probable and, in a careful judgment, set out the reasons for arriving at that decision. On perusal of the appeal record, the trial court considered all the relevant and pertinent points before coming to that decision. I do not have any quarrel with the decision of the trial court in putting the blame wholly on the shoulders of the appellant/plaintiff for the following reasons.

Firstly, applying the appellant/plaintiff's version, the damage to the motor car should not be at the extreme right rear almost hitting the bumper because the motor cycle was already in the process of turning into Jalan Sultan and, it was at that juncture that the appellant/plaintiff alleged that the motor car also turned to the right in order to enter Jalan Sultan. In so doing, the front right portion of the motor car should come into contact with the left rear portion of the motor cycle. But alas, the damage to the motor cycle was negligible more towards the front portion and from the photographs at p 20 of the appeal record, particularly photograph G, the front number plate of the motor cycle appears to be slightly off tangent. Photograph H at p 20 of the appeal record which shows the rear portion of the motor cycle potrays a picture perfect motor cycle — not a scratch of damage could be seen. In fact, the front and the rear lights of the motor cycle were still intact.

Secondly, there is no centre white line nor double white line along Jalan Elizabeth and it appears that this is the main road in relation to the location of the accident. Jalan Sultan is a minor road and there is a 'Berhenti' sign on the left side of that road as one enters or is about to enter Jalan Elizabeth. Thus, vehicles plying along Jalan Sultan before entering Jalan Elizabeth must mandatorily stop at the junction of Jalan Sultan to give way to traffic on the main road. There was evidence that the appellant/plaintiff did not stop at the junction of Jalan Sultan before entering Jalan Elizabeth and using this as the barometer to show where the appellant/plaintiff must have come from, the damage to the motor car concentrated more to the extreme right rear side would, in the circumstances, be consistent with the version of the respondent/defendant.

Thirdly, no glass fragments were found on the road to show where exactly the collision took place. The trial court rightly applied the silent evidence to come to the right conclusion that it was the appellant/plaintiff who was wholly liable.

I have read the appeal record several times and I could not find any misdirection by the trial court on the available evidence. Consequently, I am not disposed to come to a different conclusion on the printed evidence as I do not have the advantage enjoyed by the trial court of having seen and heard the witnesses. I am satisfied from the printed evidence that the trial court's conclusions are justified having put to the forefront the question whether, sitting without the privilege of the trial court who heard and tried the case, I could come to the conclusion that the trial court was plainly wrong. As I could not come to that conclusion, I have no choice but to affirm the decision of the trial court.

There is another stronger ground for me to affirm the decision of the trial court. It is this. Specific findings of fact were made by the trial court to the following effect:

> Oleh yang demikian saya memutuskan sebagai satu fakta bahawa pada masa kemalangan berlaku plantif datang dari arah Jalan Sultan (dari atas ke bawah di dalam rajah kasar), tidak berhenti di simpang di mana ia patut berhenti lalu terus melanggar kereta defendan, di bahagian tepi kanan belakang. Oleh yang demikian saya memutuskan bahawa plaintif telah cuai di dalam menunggang motosikalnya.

The principles on which an appellate court may interfere with a lower court's findings of fact can be found in the passages in the judgment of Lord Guest in *Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] MLJ 87. His Lordship in that case said [at p 92]:

> There is a heavy onus on a party who seeks to displace the conclusion formed by the trial judge on questions of fact. The principles upon which an appellate court should act in reviewing the decision of a judge of first instance were stated by Lord Thankerton in *Watt (or Thomas) v Thomas* [1947] AC 484 at p 487; [1947] 1 All ER 582 at p 587:
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> (i) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.
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> (ii) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
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> (iii) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.

The trial court in the instant appeal did not, in the course of analysing the evidence, go against the principles enunciated by Lord Thankerton as stated above.

But that is not the end of the matter. The learned counsel for the appellant/plaintiff argued that the trial court ought to consider the question of contributory negligence on the respondent/defendant's part and make an order to that effect. On this point, I must examine the statement of claim filed by the appellant/plaintiff. Paragraph 1 of the statement of claim referred to the contributory negligence by the respondent/defendant in driving the motor car but it did not specify the particulars of the contributory negligence. In the course of the trial before the trial court, there was no attempt made by the appellant/plaintiff through his counsel to amend the statement of claim by particularizing the contributory negligence alleged to be committed by the respondent/defendant. It is now trite law that each

party is bound by his own pleadings and cannot be allowed to raise an issue without due amendment. This rule enables each party to know the case he has to meet and cannot be taken by surprise. I might as well add that the courts too are bound by the pleadings in much the same way as the parties themselves. There is however a dearth of authorities for the proposition that a plaintiff in a running down case can depart from his pleadings at the hearing *provided* the defendant is not taken by surprise. In the present appeal, the trial court rightly considered the question of contributory negligence on the respondent/defendant's part and came to the conclusion that on the available evidence there was no contributory negligence as the respondent/defendant had sufficiently reduced his speed on approaching the junction of Jalan Elizabeth/Jalan Sultan and it was the appellant/plaintiff that was solely negligent in not stopping at the junction of Jalan Sultan before entering the main road of Jalan Elizabeth.

In my judgment, though the appellant/plaintiff had pleaded contributory negligence in his statement of claim, yet the failure to particularize them would be fatal. It is as good as not pleading it at all (see *Fookes v Slaytor* [1979] 1 All ER 137; [1978] 1 WLR 1293 for comparison where it was held that the defence of contributory negligence was only available if it was pleaded and that, in the absence of a pleading by the defendant of contributory negligence, the judge had no jurisdiction to make a finding of such negligence on the part of the plaintiff).

For the reasons adumbrated above, I dismissed the appellant/plaintiff's appeal on the issue of liability with costs. I affirmed the decision of the trial court in regard to the quantum of damages.

Order accordingly.

Reported by Isabel Liong